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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 315

DOROTEO FUENTES-TORRES,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the order for petitioner's deportation.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals, printed in the appendix hereto, has not yet been officially reported. The opinions of the Board of Immigration Appeals and the Special Inquiry Officer of the Immigration and Naturalization Service are unreported, but are printed in the appendix hereto.

JURISDICTION

The judgment of the Circuit Court of Appeals was rendered and entered on April 8, 1965. There was no order respecting a rehearing, nor was there any order respecting an extension of time within which to petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(11), as applied to petitioner, is an *ex post facto* law prohibited by Article I, Section 9, of the Constitution of the United States.

2. Whether the deportation of petitioner, a lawful resident alien since 1939, would constitute the denial of his right to life, liberty and property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitution of the United States, Article I, Section 9:

> "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.
>
> "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

"No bill of attainder or ex post facto law shall be passed.

"No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

"No tax or duty shall be laid on articles exported from any State.

"No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

"No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

"No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them shall, without the consent of the Congress, accept any present, emolument, office, or title, of any kind whatever, from any King, Prince, or foreign State."

Amendments to the Constitution of the United States, Article V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 241(a)(11) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1251(a)(11), as amended by Section 9 of the Act of July 14, 1960, 74 Stat. 504:

> "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * *
>
> "(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;"

STATEMENT OF THE CASE

Petitioner is a native and citizen of Mexico who came to the United States as an immigrant on June 6, 1939, at the age of thirteen. He has been a lawful permanent resident of the United States since that time. His last entry was on September 13, 1944, after a brief visit to Mexico.

On or about December 27, 1957, petitioner was convicted in the Superior Court of the State of California of the crime of the possession of marihuana in violation of section 11500 of the Health and Safety Code of the State of California.

On April 16, 1964, petitioner was ordered deported from the United States by a special inquiry officer of the Immigration and Naturalization Service, pursuant to section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(11), which provides for the deportation of aliens convicted "at any time" of the illicit possession of marihuana.

Conviction of the crime of possession of marihuana did not become an offense which could result in an alien's deportation until enactment of section 9 of the Act of July 14, 1960 (74 Stat. 504), amending section 241(a)(11) of the Immigration and Nationality Act. This was some two and one-half years after petitioner's conviction.

Petitioner's appeal from the deportation order of the special inquiry officer was dismissed by the Board of Immigration Appeals on June 4, 1964. Petitioner thereupon filed a petition for review of the said deportation order in the Circuit Court of Appeals for the Ninth Circuit, pursuant to section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105a; 75 Stat. 651. The Circuit Court of Appeals affirmed the order for petitioner's deportation on April 8, 1965.

REASONS FOR GRANTING THE WRIT

Why should the Supreme Court grant this writ when it has said more than once in recent years that the *ex post facto* clause has no application to deportation and that due process places no substantive restraint upon the power of Congress to remove aliens from the United States?

Harisiades v. *Shaughnessy*, 342 U.S. 580, 72 S. Ct. 512, 96 L. Ed. 586 (1952).

Carlson v. *Landon*, 342 U.S. 524, 72 S. Ct. 525, 96 L. Ed. 547 (1952).

Galvan v. *Press*, 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954).

Marcello v. *Bonds*, 349 U.S. 302, 75 S. Ct. 757, 99 L. Ed. 1107 (1955).

Mulcahey v. *Catalanotte*, 353 U.S. 692, 77 S. Ct. 1025, 1 L. Ed. 2d 1127 (1957).

The answer is—first, that the Court's present position is built almost exclusively upon precedent which the Court took as establishing the unlimited power of Congress to deport aliens, but which, in fact, does not stand for that proposition at all; second, that, in reaching its present position, the Court has overlooked the implications of *Keller* v. *United States*, 213 U.S. 138, 29 S. Ct. 470, 53 L. Ed. 737 (1909), a case in which the extent of congressional power was specifically regarded as an unsettled issue; and third, that failure to apply the *ex post facto* clause to deportation is a fundamental contradiction of the Court's opinion in *Jordan* v. *De George*, 341 U.S. 223, 71 S. Ct. 703, 95 L. Ed. 886 (1951), to the effect that a deportation statute may be unconstitutionally void for vagueness.

Above all, the answer is that the severity of deportation itself—the unconscionable consequences it brings down upon the long-time resident and his family—justifies a re-evaluation of the Court's current position. Surely there is something wrong when the law will permit the banishment of an alien who came to the United States as a child, for an act, committed eighteen years later, which at the time of commission was not even a deportable offense!

The issue extends far beyond the fate of petitioner or of other narcotic laws violators. Present law also authorizes the deportation of aliens who "at any time" were convicted of two crimes involving moral turpitude, or who "at any time" were members of proscribed organizations or advocates of proscribed political doctrines (Secs. 241 (a)

(4) and 241(a)(6) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(4) and 8 U.S.C. 1251 (a)(6)).

Application of the Ex Post Facto Clause

The Supreme Court's failure to apply the *ex post facto* clause to deportation is not supported by precedent.

In *Harisiades* v. *Shaughnessy, supra,* it was said that the clause prohibits only the imposition of criminal penalties, and, therefore, that it cannot be applied to deportation because deportation has never been classified as a crime or punishment. Although several cases were cited as having established such a rule, we respectfully submit that none of them actually precluded application of the *ex post facto* clause in appropriate circumstances.

The case most prominently relied upon for the rule was *Bugajewitz* v. *Adams,* 228 U.S. 585, 33 S. Ct. 607, 57 L. Ed. 978 (1913). There is, however, an almost obvious reason why the case is not in point. The reason is that the statute under consideration simply was not interpreted in a retroactive manner.

Helena Bugajewitz had been admitted to the United States in 1905. The law then, as it does now, barred the admission of prostitutes. In 1907 legislation was enacted providing that any woman alien found to be practicing prostitution within three years after her admission "shall be deemed to be unlawfully in the United States and shall be deported . . ." (Act of February 20, 1907, 34 Stat. 898). By the end of 1908, therefore, Miss Bugajewitz might have considered herself free from the risk that engaging in prostitution would bring about her deportation. However, in 1910 the law was changed to eliminate the three-year limitation (Act of March 26, 1910, 36 Stat. 263). A few months later she was arrested for being the inmate of a house of prostitution, and she was ordered deported.

Although the retroactive implications of the 1910 amendment appear to be obvious, it is crucial to a proper understanding of the *Bugajewitz* decision to recognize that her deportation was not sought on the ground that she had become a prostitute after her entry into the United States. Rather, the fact that she was a prostitute at the time of her arrest was viewed as establishing conclusively that she had been a prostitute at the time of her entry in 1905. In fact, she was not entitled to admission in the first place, and so the *ex post facto* clause was of no help to her.

That this is the proper interpretation of the *Bugajewitz* decision is evident from the Court's own reference for authority to *Johannessen* v. *United States*, 225 U.S. 227, 32 S. Ct. 613, 56 L. Ed. 1066 (1912). Johannessen had been naturalized as an American citizen in 1892 on the basis of perjured testimony. Not until 1906, however, did Congress provide a procedure for denaturalization of those who secured citizenship by fraud.

The Supreme Court rejected Johannessen's contention that the 1906 statute was void as an *ex post facto* law. It held, instead, that his naturalization, being fraudulent, was illegal from the beginning. The statute had no retroactive implication and the *ex post facto* clause, therefore, had no relevancy.[1] The basis for the deportation of Miss Bugajewitz is thus apparent by analogy to *Johannessen*. It is that she was deported because she was not entitled to admission from the beginning, just as Johannessen was not entitled to citizenship from the beginning. Thus, Mr. Justice Holmes was able to conclude the Court's opinion in the *Bugajewitz* case by commenting that "with regard

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1. Significantly, the Court said that if a statute provided for the revocation of citizenship for conduct subsequent to naturalization, it would be an *ex post facto* law. Presumably, denaturalization is no more punishment than deportation.

to the petitioner, it is not necessary to construe the statute as having any retrospective effect."

There is a second reason why the decision in *Bugajewitz* v. *Adams, supra,* did not forever rule out application of the *ex post facto* clause to deportation. It is a reason which involves the relationship between the power of Congress to deport aliens and the concept that deportation is not punishment.

If the power of Congress to deport aliens is plenary, as has been said, then deportation can never be punishment, for it must always be considered a valid exercise of congressional authority. But if there are restraints upon congressional power, then deportation for reasons having no rational relation to the authority upon which congressional power is actually founded would become punitive in nature and thus within the shelter of the *ex post facto* clause (*Flemming* v. *Nestor*, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960)).

The second reason, then, that the decision in *Bugajewitz* v. *Adams, supra,* does not preclude application of the *ex post facto* clause is that it did not hold the power of Congress to deport aliens to be unlimited. Admittedly, the Court did say that deportation is not punishment, but "simply a refusal by the government to harbor persons whom it does not want." However, to recognize the power of Congress to deport aliens is not to conclude that such power is without limits. And no such conclusion can be drawn from the case.

Mahler v. *Eby*, 264 U.S. 32, 44 S. Ct. 283, 68 L. Ed. 549 (1924), is another of the cases relied upon in *Harisiades* v. *Shaughnessy, supra,* as prohibiting application of the *ex post facto* clause in deportation proceedings. The issue there was validity of the Act of May 10, 1920 (41

Stat. 593) which provided for the deportation of aliens previously convicted of espionage or Selective Service Act violations.

Deportation, however, did not follow automatically upon proof of the specified conviction. Instead, there was an additional requirement which permitted deportation only when the Secretary of Labor, after a hearing, found "that such aliens are undesirable residents of the United States." It could be said, therefore, that the statute did not operate retroactively, but only upon a present finding of the alien's undesirability. In fact, the order of deportation in the case was reversed because no such finding had been made.

In any event, the statute was enacted as a war measure, directed against what Congress considered a threat to national security. The reluctance of the Supreme Court to upset measures effected under the Government's war powers needs no mention here. *Hirabayashi* v. *United States,* 320 U.S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943) and *Korematsu* v. *United States,* 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944).

For the same reasons, *United States ex rel Eichenlaub* v. *Shaughnessy,* 338 U.S. 521, 70 S. Ct. 329, 94 L. Ed. 307 (1950), did not necessarily establish the rule that the *ex post facto* clause has no place in deportation proceedings. Moreover, the aliens in the case did not even argue the point, but contended instead that the 1920 statute did not apply to them because they were naturalized citizens at the time of their convictions.

Finally, the Court's refusal to apply the *ex post facto* clause in deportation proceedings is fundamentally inconsistent with the rule that a deportation statute may be void for vagueness. Long established in criminal proceed-

ings, the rule was applied to deportation statutes as well in *Jordan* v. *De George, supra.*

The point of the rule is that a person is entitled to know the consequences of his conduct. A statute which is too vague to be understood gives no such notice because it is impossible to tell just what conduct is prohibited. Yet the alien who is deported for an act which was not at the time a deportable offense gets no notice of the consequences of his conduct at all!

The Supreme Court is of course well aware of a line of cases, including *Ex parte Garland,* 4 Wall. 333, and *Cummings* v. *Missouri,* 4 Wall. 277, in which the *ex post facto* clause was found effective to strike down measures providing for the disbarment of attorneys who had taken part against the Union during the Civil War. The Court there was able to find a criminal penalty in civil disguise.

Our point here is that, without the necessity of adhering to misinterpreted precedent, the Court should at last find itself able to take the same attitude with regard to deportation. Surely it is time to recognize deportation for what it is. As Mr. Justice Jackson, dissenting, described it in *Jordan* v. *De George,* 341 U.S. at 243:

> "We have said that deportation is equivalent to banishment or exile. Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation. If the respondent were a citizen, his aggregate sentences of three years and a day would have been served long since and his punishment ended. But because of his alienage, he is about to begin a life sentence of exile from what has become home; of separation from his established means of livelihood for himself and his family of American citizens. This is a savage penalty. . . ."

The Extent of the Power of Congress to Deport Aliens Has Never Been Firmly Established

Is the power of Congress to provide for the deportation of aliens really as unrestricted as the Court stated in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, and its subsequent opinions?

The answer, we suggest, depends upon whether the Court correctly identified the source of congressional power in the decisions which preceded *Harisiades*. That is, whether the power to deport aliens comes from an extra-constitutional concept of national sovereignty, which speaks of the right of a nation to rid itself of aliens for any reason deemed appropriate; or whether congressional power is actually delegated by the Constitution, and hence, limited by it. Given the latter, there must of course be a rational connection between deportation and the exercise of that power, not only to escape the *ex post facto* prohibition, but also to satisfy the *due process* clause as well (*Flemming* v. *Nestor, supra*).

In *Harisiades* v. *Shaughnessy, supra*, the Court indicated that an alien's failure to become a citizen overcomes any due process objection to his deportation. He does not stand on an equal footing with the citizen under the due process clause, the Court said, because, by remaining an alien, he retains the benefits of alienage while avoiding the duties of citizenship.

While the so-called benefits of alienage the Court referred to are more apparent than real, the important point here is that the Court found it necessary to anchor its opinion on what it considered to be a long established precedent that deportation is a "weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state" (342 U.S. at 587, 588).

Genesis of the rule was found by the Court to be in *Fong Yue Ting* v. *United States*, 149 U.S. 698, 13 S. Ct. 1016, 37 L. Ed. 905 (1893), and a number of other ancient cases dealing with the now discredited Chinese exclusion laws.[2] The fact that the Court long ago resorted to the concept of national sovereignty to validate the racial theories of those statutes might, in itself, be sufficient reason to regard the cases with skepticism. But did the early cases establish the rule for which they have been continually cited—that the power of Congress to deport aliens is wholly without substantive restraints?

We think the answer is no. Or at the very least, that there is sufficient doubt about the meanings of the early cases to justify an examination of their import by this Court—something this Court has never really attempted, despite its numerous pronouncements on the subject.

Actually, the first cases which referred to the concept of national sovereignty were the *Head Money Cases* (*Eyde* v. *Robertson*), 112 U.S. 580, 5 S. Ct. 247, 28 L. Ed. 798 (1884) and *Chae Chan Ping* v. *United States*, 130 U.S. 581, 9 S. Ct. 623, 32 L. Ed. 1068 (1889).

The *Head Money Cases* upheld a head tax upon the admission of aliens as a valid regulation of immigration *under the commerce power* of the Constitution. National sovereignty was given as the reason why the government could impose the tax, notwithstanding asserted treaty rights.

In the *Chae Chan Ping* case, the issue concerned the right of a Chinese laborer to reenter the United States on the basis of a previously issued certificate of lawful resi-

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2. The primary reference was to the *Fong Yue Ting* decision. All of the other cases cited in footnote 11 of the Court's opinion, 342 U.S. at 587, came later and were concerned either with issues relating to exclusion of aliens or procedural rights.

dence. For during his absence, the Act of October 1, 1888 (25 Stat. 504), had cancelled such certificates as proof of lawful residence. *Chae Chan Ping* attacked the statute as a violation of his right to reenter under treaties between the United States and China. The Supreme Court, however, upheld his exclusion on the ground that the United States, being an independent nation, had the obvious right to exclude aliens in the exercise of jurisdiction over its own territory. If it could not exclude aliens, the Court said, the United States would, to that extent, be subject to the control of another nation.

As it evolved from the *Chae Chan Ping* decision, therefore, the concept of national sovereignty had relevancy only to the power of Congress to exclude aliens from admission—not to the removal of long-term residents. Nor can it be said that national sovereignty was invoked to support *unlimited* congressional power over deportation in *Fong Yue Ting* v. *United States, supra,* although the case admittedly has been cited for that proposition.

The issue in the *Fong Yue Ting* case concerned validity of Section 6 of the Act of May 5, 1892 (27 Stat. 25). The statute provided that all Chinese laborers who could prove their lawful residence in the United States would be issued certificates of residence. Those who could not would be deported. The burden of proof was put upon the alien and he could sustain that burden only upon the testimony of "at least one credible white witness."

Ultimately, the Court upheld the statute as a valid rule of evidence justified by the difficulty of proving the unlawful admission of Chinese laborers. Thus, the narrow holding of the case actually related again to the exclusion powers of Congress. The aliens were removed from the United States, not as long-term residents who had been

lawfully admitted in the past, but to the contrary, as those who could not establish their lawful admissions.

The Court's comment, therefore, that the power of any nation to expel or deport foreigners is "as absolute and unqualified as the right to prohibit and prevent their entrance into the country" (149 U.S. at 707) is actually no more than dictum. Moreover, throughout the opinion, the Court made it clear that it considered congressional power over deportation actually to be constitutionally delegated.[3] Perhaps the following comment is the most logical explanation of what appears to be a rather contradictory opinion:

> "The power to regulate immigration is an incident of the sovereign right to expel or exclude objectionable aliens. The exercise of the power in a particular country is governed by the constitution and laws. In the United States it belongs to the National Government as part of its power to regulate commerce."
>
> *Moore,* Digest of International Law, 151 (1906).

As a matter of fact, *Fong Yue Ting* could not have settled the question of the extent of congressional power because the Supreme Court itself specifically regarded the question as still unanswered in *Keller* v. *United States, supra.* The Court there took note of *Fong Yue Ting* as one of the cases recognizing the authority of Congress to exclude and deport aliens. But it went on to make the following comment:

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3. Extensive comments upon the meaning of the *Fong Yue Ting* decision, as well as upon other cases involved in this discussion, are made in the following articles:

Hesse, "The Constitutional Status of the Lawfully Admitted Permanent Resident Alien," 68 Yale L.J. 1578, and 69 Yale L.J. 261 (1959).

Boudin, "The Settler Within Our Gates," 26 N.Y.U.L. Rev. 266, 451, 634 (1951).

> "It is unnecessary to determine how far Congress may go in legislating with respect to the conduct of an alien while residing here, for there is no charge against one. . . ."

The importance of the case may have been overlooked in recent years because it actually involved charges brought against American citizens. The point here is nonetheless the same—that in *Keller*, the Supreme Court did not consider unlimited congressional power a firmly established rule.

Actually, a restriction upon the power of Congress can be found in the dissenting opinion of Mr. Justice Holmes. His dissent is of particular importance because he was later to write the Court's opinion in *Bugajewitz* v. *Adams, supra.* Analysis of his opinion in *Keller*, we submit, lends weight to our earlier argument that *Bugajewitz* does not stand for the concept of unrestricted congressional power.

Mr. Justice Holmes saw the power of Congress to deport aliens as a logical counterpart of its power to exclude them. He said Congress has the authority to determine by the alien's conduct after entry, for a period "long enough to make sure of the facts," that the alien did not enter illegally. Just how long is long enough, he did not say. Implicit in his opinion, however, is the possibility that Congress might reach too far back in raising an inference of unlawful admission, and, in such event, that the Supreme Court could intervene.

Moreover, this interpretation is not disturbed by the decision in *Bugajewitz*, even though the inference of unlawful admission at issue there had no limitation in time. For Miss Bugajewitz had in fact been arrested only five years after her entry, still within the period, no doubt,

in which Congress "could make sure of the facts." In any event, her counsel did not challenge validity of the presumption as applied to her, but rested his case primarily on the argument that she was being deported for commission of a crime without a trial (57 L. Ed. 979).

If Congress might go too far back in legislating rules of evidence, how is this restraint to be squared with the proposition that our national sovereignty permits the removal of aliens at any time for any reason? The question itself, we submit, suggests the likelihood that the Court has been too quick to accept the doctrine of unlimited congressional power.

An alternative due process argument, although rejected in *Harisiades* v. *Shaughnessy, supra,* may be appropriate here inasmuch as the reasons given for rejecting it in *Harisiades* are not valid here. The argument, as the Court itself stated it, is—assuming that Congress has plenary power to deport aliens, the power may be so "unreasonably and harshly exercised" as to render the legislation unconstitutional.

In *Harisiades,* that argument was turned down on the theory that Congress could validly enact a statute for the deportation of former Communists because of the threat it saw in the international Communist movement. No such justification can be found, however, for the deportation of petitioner in any of the powers delegated to Congress by the Constitution.

Since this argument does not appear to have been presented in any of the cases subsequent to *Harisiades,* it may well be appropriate for consideration now.

CONCLUSION

We respectfully submit that the power to deport aliens is conferred upon Congress by the Constitution; whether that authority is derived from the commerce power, the war power, the power over foreign relations, or any other power, the deportation of petitioner has a rational connection to none of them, and his deportation is therefore prohibited by the *ex post facto* clause and the *due process* clause.

We have stressed the possibility that the early cases decided by the Supreme Court have been misconstrued in recent years, not only because of the Court's insistence that it cannot upset the long-established rule it has until now followed, but also because it appears the Court has not really paused to analyze the true meaning of its earlier decisions.

Speaking for the Court in *Galvan* v. *Press*, 347 U.S. at 531, Mr. Justice Frankfurter said:

> "In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power . . . much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation.
>
> "But the slate is not clean. . . ."

It is truly ironic that the Court should fail to question the past in view of its obvious reluctance to adhere to the past.

We respectfully urge this Court to grant this writ so that it may re-examine the validity of its present attitude upon this important constitutional issue.

Dated, San Francisco, California, June 21, 1965.

MILTON T. SIMMONS,
Attorney for Petitioner.

DONALD L. UNGAR,
Of Counsel.

APPENDIX

United States Court of Appeals

FOR THE NINTH CIRCUIT

DOROTEO FUENTES-TORRES,
Petitioner,
vs.
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.
No. 19,456

[Apr. 8, 1965]

On Motion for Summary Disposition

Before: HAMLEY, MERRILL and BROWNING, Circuit Judges

PER CURIAM:

Proceeding under section 106(a) of the Immigration and Nationality Act (Act), 75 Stat. 651 (1961), 8 U.S.C. § 1105a (1958, Supp. III), Doroteo Fuentes-Torres petitioned this court to review an order for his deportation from the United States to Mexico.

Petitioner is a native and citizen of Mexico who last entered the United States at Del Rio, Texas, on September 13, 1944. On December 27, 1957, he was convicted in the Superior Court of the State of California in and for the County of Santa Clara of the crime of possession of marihuana in violation of section 11500 of the Health and Safety Code of the State of California. The crime of which petitioner was convicted was committed on March

18, 1957. As a result of this conviction Fuentes was sentenced to the California State Prison for the term provided by law and actually served two years.

By reason of this conviction the Immigration and Naturalization Service ordered Fuentes to show cause why he should not be deported pursuant to section 241(a)(11) of the Immigration and Nationality Act, 74 Stat. 505 (1960), 8 U.S.C. § 1251(a)(11) (1958, Supp. III). Under this statute any alien in the United States shall, upon order of the Attorney General, be deported who at any time has been convicted of a violation of any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana.

After proceedings before a special inquiry officer, that official entered an order for the deportation of Fuentes to Mexico on the charge referred to above. This order was sustained by the Board of Immigration Appeals and Fuentes then petitioned for review in this court.

In his brief in this court petitioner presents only one argument, namely that section 241(a)(11) of the Act, as applied to him, is an *ex post facto* law and, as such, is void under Article I, section 9 of the Constitution of the United States.

The factual basis for this contention is as follows: Section 241(a)(11), as it existed in 1957 when Fuentes committed the offense in question, made subject to deportation any alien who, after entry, has been convicted of the crime of possession of "narcotics drugs." However, this court, in *Hoy* v. *Mendoza-Rivera*, 9 Cir., 267 F.2d 451, and *Hoy* v. *Rojas-Gutierrez*, 9 Cir., 267 F.2d 490, both decided in 1959, held that the crime of possession of narcotic drugs, as referred to in section 241(a)(11), did not include the crime of possession of marihuana.

Reacting to these decisions, Congress on July 14, 1960, amended section 241(a)(11) to add the words "or marihuana." See 1960 U.S. Code Cong. and Admin. News, pages 3134-3135. Thus conviction of the crime of possession of marihuana was first made a cause for deportation more than three years after Fuentes committed that offense.

Petitioner concedes in his brief that the United States Supreme Court has several times held that the *ex post facto* clause of the Constitution may not be applied in deportation proceedings. See *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593-596; *Galvan* v. *Press*, 347 U.S. 522, 531-532; *Marcello* v. *Bonds*, 349 U.S. 302, 314; *Mulcahey* v. *Catalanotte*, 353 U.S. 692, 694. He nevertheless contends to the contrary, believing that he can present arguments which will lead to an overruling of past precedent.

In view of this posture of the case respondent has moved for summary disposition of the petition for review, noting that only the Supreme Court can overrule its past decisions. At argument upon this motion, petitioner did not seriously object to summary disposition of the petition, apparently recognizing that the path he has chosen to follow necessarily leads him to the Supreme Court.

Under the circumstances we believe that summary disposition is warranted, and the motion is therefore granted. On the authority of the Supreme Court decisions cited above, the order for deportation is affirmed.

U. S. DEPARTMENT OF JUSTICE

Board of Immigration Appeals

June 4, 1964

File: A-3498680—San Francisco
In re: DOROTEO FUENTES-TORRES
IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Donald L. Ungar, Esquire Phelan, Simmons & Ungar, 1210 Mills Tower, San Francisco, Calif. 94104

CHARGES:

Order: Sec. 241(a)(11) I&N Act (8 USC 1251(a)(11))—Convicted of possessing marijuana

Lodged: None

APPLICATION: Termination of proceedings

This appeal concerns a native and citizen of Mexico, age 38, who last entered the United States at Del Rio, Texas on or about September 13, 1944. On December 27, 1957 he was convicted in the Superior Court of the State of California in and for the County of Santa Clara of the crime of possession of marijuana, in violation of Section 11500 of the Health and Safety Code of the State of California, and was sentenced to the State Prison for the term provided by law. He actually served two years.

Respondent is married to a citizen of the United States and has three native born children. It is indicated that he has been separated from his wife for over a year. The special inquiry officer stated that respondent was then

serving a nine-month sentence for failure to support his family.

In connection with the appeal counsel submitted a written brief in which he argues that respondent's conviction on December 27, 1957 for possession of marijuana did not subject him to deportation and that it was only with the enactment of Public Law 86-648 on July 14, 1960 amending Section 241(a)(11) of the Immigration and Nationality Act, that conviction for possession of marijuana became a deportable offense.

We have ruled adversely to counsel's position. Interim Decision 1281 of May 7, 1963 in the *Matter of Gardos*. See also *Mulcahey* v. *Catalanotte*, 353 U.S. 692. Accordingly, the appeal will be dismissed.

ORDER: It is ordered that the appeal be dismissed and the order of the special inquiry officer be affirmed.

/s/ Thomas C. Finucane
Chairman

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE
File A3 498 680—San Francisco, California

April 16, 1964

In The Matter Of DOROTEO FUENTES-TORRES Respondent	In Deportation Proceedings

CHARGE:

I & N Act—Section 241(a)(11)—convicted of possessing marijuana

APPLICATION: None

IN BEHALF OF RESPONDENT: No one

IN BEHALF OF THE SERVICE: No one

Oral Decision of the Special Inquiry Officer

The respondent is a native and citizen of Mexico, age 38, who last entered the United States at Del Rio, Texas on or about September 13, 1944. On December 27, 1957, he was convicted in the Superior Court of the State of California, in and for the County of Santa Clara, of the crime of possession of marijuana, in violation of Section 11500 of the Health and Safety Code of the State of California, and was sentenced to the state prison for the term provided by law. He actually served two years. I find that he is deportable on the charge set forth in the Order to Show Cause.

The respondent is married to a citizen of the United States and has three native-born children. He has, however, been separated from his wife for over a year. He is presently serving a nine-month sentence for failure to

support. He thinks his wife is being supported by "welfare". He was also convicted in the United States District Court of Los Angeles for forgery in 1945, but was given probation. His mother is a native-born citizen of the United States. He himself was admitted to the United States for permanent residence in 1939. It does not appear that he is eligible for any form of discretionary relief, and an order for his deportation will, therefore, be entered.

IT IS ORDERED that the respondent be deported from the United States to Mexico on the charge set forth in the Order to Show Cause

/s/ Chester Sipkin
Chester Sipkin
Special Inquiry Officer

United States Court of Appeals

FOR THE NINTH CIRCUIT

DOROTEO FUENTES-TORRES,
Petitioner,
vs.
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.
No. 19,456

Judgment

Upon Petition to Review an order of the Immigration and Naturalization Service

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and upon motion of respondent for summary disposition and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the motion for summary disposition be and hereby is granted and that the order of the said Immigration and Naturalization Service for deportation in this Cause be and is hereby affirmed.

Filed and entered: April 8, 1965.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 315

DOROTEO FUENTES-TORRES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 344 F. 2d 911.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1965 (Pet. App. A8). The petition for a writ of certiorari was filed on July 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether this Court should reexamine its decisions holding that statutes relating to the deportation of aliens are not subject to the constitutional prohibition against *ex post facto* laws.

STATUTE INVOLVED

Section 241(a)(11) and (d) of the Immigration and Nationality Act of 1952, 66 Stat. 204, 206, 208, as amended by the Act of July 18, 1956, § 301(b), 70 Stat. 575, and by the Act of July 14, 1960, § 9, 74 Stat. 505 (8 U.S.C. 1251(a)(11) and (d)), provides in pertinent part:

> SEC. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * *
>
> (11) * * * at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana * * *;
>
> * * * *
>
> (d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding * * * (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.
>
> * * * *

STATEMENT

On April 16, 1964, following proceedings before a special inquiry officer, petitioner, a 39-year-old native and citizen of Mexico, who had last entered the United States at Del Rio, Texas, on September 13, 1944,[1] was ordered deported to Mexico on the ground that on December 27, 1957, he had been convicted in the California Superior Court in and for the County of Santa Clara for the offense of possessing marihuana[2] —a crime making him deportable (after his conviction) under Section 241(a)(11) of the Immigration and Nationality Act of 1952, as amended (Pet. App. A6-A7). On June 4, 1964, the Board of Immigration Appeals affirmed the order (Pet. App. A4-A5), and on April 8, 1965, in review proceedings brought under Section 106(a) of the Act, 8 U.S.C. 1105a(a), the

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[1] Petitioner's original entry, for permanent residence, occurred in 1939, when he was thirteen (Pet. App. A 7). The 1944 reentry, according to the petition, followed a brief visit to Mexico (Pet. 4). Petitioner is married to a citizen of the United States and has three native-born children. At the time of the special inquiry officer's decision, he had been separated from his wife for over a year and he was serving a nine-month sentence for failure to support her. He advised the special inquiry officer that he "thought" his wife was being supported by "welfare" (Pet. App. A6-A7).

[2] In violation of Section 11500 (now in pertinent part Section 11530) of the California Health and Safety Code. Petitioner was sentenced for the offense to imprisonment in the California State Prison for the term prescribed by law, of which he actually served two years (Pet. App. A6). An earlier conviction—in the United States District Court for the Southern District of California, in 1945, for forgery—resulted in his being placed on probation (Pet. App. A7).

court of appeals also affirmed (Pet. App. A1-A3, A8). The court of appeals noted that conviction of possession of marihuana was first made a cause for deportation on July 14, 1960,[3] more than three years after the commission by petitioner of the relevant offense. Observing, however, that it had been settled by repeated decisions of this Court that the *ex post facto* clause of the Constitution does not apply to deportation statutes and that the sole basis for petitioner's challenge to the deportation order was that these holdings were erroneous and should be overruled, the court sustained the order.

ARGUMENT

This Court, as petitioner acknowledges (Pet. 5), has repeatedly (and in recent years) held that the *ex post facto* clause of the Constitution has no application to deportation statutes. See, *e.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593-596; *Galvan* v. *Press*, 347 U.S. 522, 529-532; *Marcello* v. *Bonds*, 349 U.S. 302, 314; *Lehmann* v. *Carson*, 353 U.S. 685, 690;

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[3] Previously, Section 241(a)(11) (as amended by the Act of July 18, 1956, § 301(b), 70 Stat. 575) had made it a ground for deportation to be (or have been) convicted of violating or conspiring to violate any law or regulation relating to the illicit possession of or traffic in "narcotic drugs." The Act of July 14, 1960, § 9, 74 Stat. 505, added the words "or marihuana." See p. 2, *supra*. The 1960 amendment—as noted by the court of appeals at Pet. App. A2-A3—was in response to, and was designed to overcome the effect of, two 1959 decisions by that court, *Hoy* v. *Mendoza-Rivera*, 267 F. 2d 451, and *Hoy* v. *Rojas-Gutierrez*, 267 F. 2d 490, which had held that marihuana was not a narcotic drug within the purview of the section as it had formerly read.

Mulcahey v. *Catalanotte*, 353 U.S. 692, 694. Cf. *Carlson* v. *Landon*, 342 U.S. 524, 534. As observed in *Galvan* v. *Press*, *supra*, 347 U.S. at 531:

> Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. * * * [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation.

Petitioner's sole contention is that the Court should reexamine this well-settled rule. None of the reasons suggested in the petition supports this course.

1. The fact that in *Bugajewitz* v. *Adams*, 228 U.S. 585 (one of the cases referred to in *Harisiades* v. *Shaugnessy*, *supra*, 342 U.S. at 594, as authority), the Court's observation regarding this principle was not necessary to the decision (Pet. 7-8) is plainly no warrant for such a reexamination.[4] Even less germane

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[4] The Court said in *Bugajewitz:* "The prohibition of *ex post facto* laws in Article I, § 9, has no application [to deportation statutes] [citing *Johannessen* v. *United States*, 225 U.S. 227, 242], and with regard to the petitioner it is not necessary to construe the statute as having any retrospective effect" (228 U.S. at 591). That the Court in *Harisiades* was well aware that the pertinent statement in *Bugajewitz* was *dictum* is clear. The entire statement from the earlier opinion, as quoted above, was quoted in the *Harisiades* opinion (342 U.S. at 594).

is the fact (Pet. 6, 15-16) that in *Keller* v. *United States*, 213 U.S. 138, 144, the Court remarked (in ruling on an issue not otherwise pertinent) that it was "unnecessary to determine" in that case "how far Congress may go" in legislating with respect to the conduct of a resident alien.

2. Nor does anything which was said or done by the Court in *Jordan* v. *De George*, 341 U.S. 223, furnish a reason for the *de novo* inquiry which petitioner advocates. The Court in that case (at 231-232) examined a deportation statute with a view to determining whether it gave adequate warning of the kind of conduct from which aliens who might be affected by it were required to desist. Petitioner argues that the fact that the Court thought it necessary to scrutinize the statute with that purpose in mind is inconsistent with the view that the *ex post facto* clause does not apply to deportation laws. The statute involved in the *Jordan* case, however (see 341 U.S. at 225), was basically prospective in character—it subjected to deportation those who "hereafter" were sentenced more than once to imprisonment for one year or more for a crime involving moral turpitude. The Court could reasonably have assumed, therefore, that the purpose of the enactment was partly to deter aliens from committing the kinds of misconduct defined—a characteristic purpose of a criminal statute. Moreover, the alleged vagueness of the statute affected its validity not merely because it might not have constituted fair warning but also because it might result in unequal application of the statute—a danger which is not presented by a definite retrospective provision. In the present case, Congress has made explicit its intent to

make past misconduct or a past event a cause for deportation.

3. The essential point is that, as this Court has often observed, deportation, however drastic may be its impact in a particular case on the life and family ties of an affected individual, is not and has never been considered a punishment for crime. The fundamental and characteristic purpose of a deportation law is not to punish, but, as was said in *Mahler* v. *Eby*, 264 U.S. 32, 39, "to rid the country of persons who ha[ve] shown by their career that their continued presence here would not make for the safety or welfare of society." Cf. *Bugajewitz* v. *Adams*, *supra*, 228 U.S. at 591 (per Holmes, J.): "[D]eportation [is not] a punishment; it is simply a refusal by the Government to harbor persons whom it does not want."

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

JULY 1965.

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